No. 90-569

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

N.A.A.C.P., DETROIT BRANCH; THE GUARDIANS, INC. BRADY BRUENTON; CYNTHIA MARTIN; HILTON NAPOLEON; SHARRON RANDOLPH; BETTY T. ROLLAND; GRANT BATTLE; CYNTHIA CHEATOM; EVIN FOBBS; JOHN H. HAWKINS; HELEN POELNITZ, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

DETROIT POLICE OFFICERS ASSOCIATION (DPOA); DAVID WATROBA, PRESIDENT; CITY OF DETROIT; COLEMAN A. YOUNG, MAYOR; DETROIT POLICE DEPT.; BOARD OF POLICE COMMISSIONERS; WILLIAM HART, CHIEF,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS DPOA AND DAVID WATROBA

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals correctly held that bona fide seniority plans relating to layoffs of public employees are exempt from attack under the constitution, the Civil Rights Act of 1964 and earlier civil right statutes.

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PRELIMINARY STATEMENT

Respondent DPOA and David Watroba, President (hereinafter collectively referred to as "Respondent DPOA"), submit this brief in opposition to the petition for writ of certiorari. Respondents City of Detroit, Coleman A. Young, Detroit Police Dept., Board of Police Commissioners, and William Hart (collectively referred to as "the City") are separately represented, and Respondent DPOA incorporates by reference the arguments of the City in opposition to the petition for writ of certiorari.

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COUNTER-STATEMENT OF CASE

The individual Petitioners are a class of black police officers employed by the City of Detroit. This suit was filed against the City and Respondent DPOA alleging that certain layoffs of police officers in 1979 and 1980 violated Petitioners' rights under the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. §1981, 42 U.S.C. §1983, and 42 U.S.C. §1985(3). The layoffs were made pursuant to a bona fide seniority plan collectively

bargained for by Respondent DPOA and the City. This plan called for layoffs to be made on a "last-hired, first-fired" basis.

Petitioners based their action on *Baker v. City of Detroit*, 483 F.Supp. 930 (E.D. Mich. 1979), which held that the City had engaged in intentional racial discrimination violative of the Equal Protection Clause. Petitioners alleged the layoffs reduced the percentage of black officers on the uniformed force, while the City had not remedied the effects of past discrimination found in *Baker* by increasing the number of black officers on the force. The specific allegations against Respondent DPOA were that by allowing the layoffs to occur and not bargaining to stop the layoffs and to protect the jobs of Petitioners, it had violated 42 U.S.C. §§1981, 1983, and 1985(3), the Thirteenth Amendment of the United States Constitution, and had breached its duty of fair representation under Michigan law.

Each claim of Petitioners against Respondent DPOA has been dismissed. The District Court, in an opinion dated July 25, 1984, held that Respondent DPOA was not liable under the Thirteenth Amendment, and that the DPOA had not violated 42 U.S.C. §1985(3) as there was no conspiracy between the City and the DPOA. *N.A.A.C.P. v. D.P.O.A.*, 591 F.Supp. 1194 (E.D. Mich. 1984), P. A-1, 53[1]. However, that court did not hold that the DPOA breached the duty of fair representation owed its minority members.

The Sixth Circuit Court of Appeals, in a decision dated June 12, 1987, reversed the District Court's holding as to Respondent DPOA's duty of fair representation. *N.A.A.C.P. v. D.P.O.A.*, 821 F.2d 328 (6th Cir. 1987), P. A-57, 65-66. The Court of Appeals held that under Michigan law, a public employer's decision to lay off employees is a permissive bargaining subject and therefore the union had no mandatory duty to act on behalf of those threatened with a layoff.

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[1] Page references are to the Appendix contained in the Petition for Writ of Certiorari.

The matter was remanded to the District Court for consideration of Petitioners' claims against the DPOA that had not been reached by the District Court. On remand the District Court dismissed the Petitioners' §1983 claim against the DPOA, as the actions of the DPOA did not involve "state action." *N.A.A.C.P. v. D.P.O.A.*, 676 F.Supp. 790 (E.D. Mich., 1988), P. A-67, 70. The District Court later held, in a separate opinion, that any action against the union was moot, as everything which the court had desired to accomplish in its original judgment had been accomplished at that time. The District Court noted that a majority of the members of the DPOA were black, and therefore they were able to protect themselves through intra-union political action. *N.A.A.C.P. v. D.P.O.A.*, 685 F.Supp. 1004 (E.D. Mich. 1988), P. A-87, 90-93.

The Court of Appeals, in a decision dated April 9, 1990, affirmed the District Court's decision on other grounds. Although it found that the matter was *not* moot, it held that §703(h) of Title VII of the Civil Rights Act of 1964, as set forth in 42 U.S.C. §2000e-2(h), exempts a bona fide seniority plan from attack. *N.A.A.C.P. v. D.P.O.A.*, 900 F.2d 903 (6th Cir. 1990), P. A-94, 101-111. The appeals court held that the last-hired, first-fired seniority plan adopted by the collective bargaining agreement between the City and respondent DPOA was bona fide and exempt from attack under both constitutional and statutory civil rights provisions.

The Petition for Writ of Certiorari was submitted by Petitioners on September 17, 1990, but was not accepted by the Clerk of the Supreme Court because of procedural errors. The petition was revised and resubmitted, and Respondent DPOA received a copy of the revised petition on October 1, 1990. In that document, Petitioners assert five reasons for granting the writ of certiorari. Respondent DPOA contends that none of these reasons provides a basis for granting the writ, based upon the facts and arguments contained in this brief.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I.

The Court of Appeals opinion does not conflict with any decisions of other circuits.

In support of this reason for denying the Petition, Respondent DPOA relies upon and incorporates herein the argument set forth by the City in its Brief in Opposition to granting the writ.

II.

The Court of Appeals opinion does not conflict with any decisions of this Court.

In support of this reason for denying the Petition, Respondent DPOA relies upon and incorporates herein the argument set forth by the City in its Brief in Opposition to granting the writ.

III.

Any issues pertaining to 42 U.S.C. §1983 do not pertain to Respondent DPOA.

The District Court granted Respondent DPOA's motion for summary judgment on Petitioners 42 U.S.C. §1983 claim, as the actions of the DPOA did not constitute state action. *N.A.A.C.P. v. Police Officer's Association*, 676 F.Supp. 790, 791 (E.D. Mich. 1988), P. A-70. Petitioners had the opportunity to appeal that decision to the Sixth Circuit Court of Appeals when Petitioners appealed the District Court's determination that this matter was moot. However, Petitioners chose not to raise that issue on appeal and accepted the District Court's decision that the actions of Respondent DPOA did not constitute state action. The Supreme Court must not consider issues that were not presented to and decided by the court below. *Walters v. City of St. Louis*, 347 U.S. 231 (1954). The Court of Appeals has not reviewed the applicability of 42 U.S.C. §1983 to Respondent DPOA, as Petitioners did not present that issue on appeal. Therefore, if this Court decides to review any issues regarding 42 U.S.C. §1983, that review should not include any claim against Respondent DPOA.

IV.
The Court of Appeals' opinion on union liability does not conflict with any rulings of this Court.

Court of Appeals findings on DPOA liability.

The Court of Appeals in its 1987 decision determined that Respondent DPOA had not breached its duty of fair representation to the minority members of the union under Michigan law.

The Court of Appeals stated the following:

> There is no finding of intentional discrimination by the union against its members. The District Court stated that the union had not been found guilty of intentional discrimination, and that its defense of the bona fide seniority provision was not improper. The District Court's finding of liability instead stemmed from the union's action 'as a whole' in response to the threatened layoffs, not its 'defense of any particular position.' To remedy this alleged breach of the duty of fair representation, the District Court ordered the union to integrate black officers into its leadership structure within one year.

N.A.A.C.P. v. D.P.O.A., 821 F.2d 328, 331 (6th Cir. 1987), P. A-63.

The Court of Appeals noted that Michigan law applies to the relationship between the union and its members, and that the union has a duty of fair representation under Michigan labor law. The Court of Appeals quoted from *Goolsby v. City of Detroit*, 419 Mich. 651, 664, 358 N.W.2d 856, 863 (1984), in defining that duty. It is composed of three responsibilities:

> (1) To serve the interests of all members without hostility or discrimination toward any, (2) to exercise its discretion with complete good faith and honesty, and (3) to avoid arbitrary conduct.

N.A.A.C.P. v. D.P.O.A., 821 F.2d at 332, P. A-64.

The Court of Appeals held:

> In our case, under Michigan law, a public employer's initial decision to layoff is a permissive subject of bargaining. Therefore, the union had no mandatory duty to act on behalf of its members in response to the threatened layoffs. Absent the duty to act, failure to act forcefully does not breach the union's duty of fair representation.

N.A.A.C.P. v. D.P.O.A., 821 F.2d at 332, P. A-65 (citations and footnote omitted).

The Court of Appeals also noted that the District Court did not find that the union was improperly motivated in its reaction to the layoff. Instead the District Court held that the union's mere failure to act was a breach of its duty of fair representation. The Court of Appeals stated:

> Absent a finding of intentional discrimination or other improper motivation, the union's mere failure to bargain forcefully enough in a permissible context does not by itself constitute bad faith or discrimination.

N.A.A.C.P. v. D.P.O.A., 821 F.2d at 333, P. A-66.

The Court of Appeals remanded the matter to the District Court for consideration of whether Respondent DPOA violated 42 U.S.C. §1981, as the District Court had not addressed that issue in its original opinion.

On remand, although the District Court denied Respondent DPOA's motion for summary judgment as to §1981, the District Court decided that the matter was moot, as blacks constitute a majority of the union and can protect themselves through intra-union political action against any acts that would deprive the members of their rights under that statute. *N.A.A.C.P. v. D.P.O.A.*, 685 F.Supp. 1004, 1007 (E.D. Mich. 1988).

Petitioners appealed the District Court's holding that the matters were moot. In *N.A.A.C.P. v. D.P O.A.*, 900 F.2d 903 (6th Cir. 1990), the Court of Appeals overruled the District Court, and held that the matters were not moot. However, the Court further held that Title VII exempts bona fide seniority plans from attack under 42 U.S.C. §1981.

The Court of Appeals dismissal of Petitioner's 42 U.S.C. §1981 claim is consistent with prior decisions of this Court.

Respondent DPOA hereby adopts and incorporates by reference the arguments presented by the City that §703(h) of Title VII protects bona fide seniority plans from challenges asserted under Title VII, 42 U.S.C. §1981 and 42 U.S.C. §1983. Additionally, Respondent DPOA submits the following arguments against granting the writ on this issue and responds to arguments by Petitioners directed at Respondent DPOA.

Petitioners cite *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), in support of their contention that a claim under 42 U.S.C. §1981 may not be barred by §703(h) of Title VII. However, *Johnson* in no way addresses the application of §703(h) to claims brought under 42 U.S.C. §1981. Although *Johnson* does point out that the Civil Rights Act of 1964 does not replace or exclude earlier acts, neither *Johnson* nor any other case cited by Petitioners holds that §703(h) does not apply to all civil rights claims. In *Pettway v. American Cast Iron Pipe Company*, 576 F.2d 1157 (5th Cir. 1978), the Court of Appeals held that bona fide seniority systems are protected by §703(h), whether the suit is brought under Title VII or §1981. The Supreme Court denied *certiorari*, 439 U.S. 1115 (1979). Other Circuit Courts have made similar decisions directly on this issue. *Freeman v. Motor Convoy, Inc.*, 700 F.2d 1339 (11th Cir., 1983); *Chance v. Board of Examiners and Board of Education*, 534 F.2d 993 (2d Cir. 1976), *cert. denied*, 431 U.S. 965; *Waters v. Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976).

Petitioners also assert that several opinions of this Court regarding the co-existence of the Civil Rights Act of 1964 and earlier Civil Rights Acts have been misinterpreted or misconstrued by the Sixth Circuit in its opinion. However, even when one assumes that the Petitioners' interpretation of these decisions is correct, none of these cases prohibit the application of §703(h) to prior Civil Rights Acts. Petitioners have not presented any basis for their contention that §703(h) of Title VII cannot be applied to 42 U.S.C. §1981.

Petitioners have presented no basis for this Court's review of prior decisions on its fair representation claim.

Petitioners state that the Court of Appeals second and most recent opinion on this action addresses the issue of Respondent DPOA's duty of fair representation under state law. However, with the exception of references to its earlier decision and the decision by the District Court, the Court of Appeals was not faced with, and did not decide, the question of whether Respondent DPOA breached any duty of fair representation owed to the minority members of the union. The Court of Appeals in its 1988 decision held that the DPOA had not breached any duty of fair representation under Michigan law. Petitioners failed to petition this Court for writ of certiorari pursuant to Supreme Court Rule 13 within 90 days after the Court of Appeals entered its previous decision. Rule 13 states as follows:

> 1. A petition for writ of certiorari to review a judgment, in any case, civil or criminal, entered by a state court of last resort, a United States Court of Military Appeals shall be deemed in time when it is filed with the Clerk of this Court within *90 days* after the entry of the judgment. (Emphasis added.)

The Sixth Circuit Court of Appeals made a final decision as to the fair representation claim by reversing the District Court's decision that Respondent DPOA had breached its duty of fair representation. Petitioners failure to request certiorari after the Court of Appeals' decision bars Petitioners from any further review of that issue.

If this Court determines that Petitioners do have the right to have the issue reviewed, Respondent DPOA contends that no breach of its duty of fair representation has been committed.

Petitioners state that *Local 1277 A.F.S.C.M.E. v. City of Center Line*, 414 Mich. 642, 327 N.W. 2d 822 (1982), has been misconstrued by the Court of Appeals. Petitioners contend that *Local 1277* states that the *impact* of a layoff is a mandatory subject of bargaining.

However, a thorough reading of the *Local 1277* opinion makes it clear that the "impact" referred by the Michigan Supreme Court is only a mandatory issue of bargaining under state law when that impact relates to the wages, hours, and other terms and/or conditions of employment. Petitioners' quote from *Local 1277* is taken out of context, as the Michigan Supreme Court was quoting the *City's position* that motives behind layoffs are mandatory subjects of bargaining. The Michigan Supreme Court did not hold that under Michigan law layoffs are a mandatory bargaining subject or that layoffs of black police officers specifically affect the wages, hours, or other conditions of employment. The Sixth Circuit Court of Appeals' opinion holding that there was no breach by the union of its duty of fair representation under *state law* must not be reviewed.

V.

There is no action by Congress, either historic or current, which supports granting this petition.

Petitioners argue that Congressional action supports granting this petition. However, Petitioners fail to indicate how any Congressional action supports the review of this matter by the Supreme Court. It is true that Congress has stated in the Civil Rights Act of 1990 that the Act must be given broad interpretation. However, that Act has been vetoed by the President and is not in effect. Additionally, the 1990 Act cannot be used to interpet the Civil Rights Act of 1964, or any earlier Civil Rights Acts. Petitioners also cite several occasions where Congress enacted statutes

to override decisions by the federal courts which Congress viewed as unduly restrictive readings of statutes. It seems that Petitioners are asking this Court to take the place of Congress and take some action to change or alter plain and established interpretations of statutes that were under review in this matter. Respondent DPOA contends that legislative actions should be left to Congress, and therefore this Court should not grant the Petition for Writ of Certiorari on these grounds.

CONCLUSION

The Petition for Writ of Certiorari should be denied as the Sixth Circuit Court of Appeals' application of Title VII of the Civil Rights Act of 1964 to the Fourteenth Amendment and 42 U.S.C. §§1981, 1983, and 1985(3) is not in conflict with any decisions of this Court or any Circuit Court of Appeals. Furthermore, Petitioners have not preserved their claim under 42 U.S.C. §1983 or their claim that Respondent DPOA has violated its duty to represent fairly the Petitioners who are members of the DPOA, as Petitioners have not timely appealed the earlier opinions of the District and Circuit Courts regarding those issues.

Respectfully submitted,

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